STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 20, 2013
v	No. 310489 Genesee Circuit Court
RANDY ALLEN LYNCH, Defendant-Appellant.	LC No. 10-027943-FH

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress a statement he made to Sergeant David Dwyer while in the booking room and subsequently admitting the statement into evidence. We review for clear error a trial court's findings of fact in a suppression hearing but review de novo its ultimate decision on a motion to suppress. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). A trial court's error in admitting into evidence statements obtained in violation of *Miranda*[1] is a nonstructural constitutional error. *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

We find no merit in defendant's contention because the record simply does not support his claim of error. That is, there was no error because the statement defendant made to Dwyer while in the booking area was neither introduced nor admitted into evidence by the trial court. A thorough review of the trial transcripts reveals that the prosecutor did not offer *any* statement made by defendant into evidence, and the trial court did not admit into evidence *any* statement made by defendant. Defendant also fails to cite any trial record to suggest that defendant's statement to Dwyer was either introduced or admitted into evidence. Accordingly, the jury never

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

considered the statement made by defendant to Dwyer, and there was no error that could have been made.

Defendant also contends that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence of first-degree home invasion because he never entered the dwelling. Defendant preserved this issue by filing a motion for a directed verdict. See *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Accordingly, we review a preserved challenge to the trial court's decision denying a motion for a directed verdict de novo to determine whether the evidence produced by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational jury that the essential elements of the crime were proved beyond a reasonable doubt. *Id.*

To establish first-degree home invasion, the prosecution must prove beyond a reasonable doubt: (1) that the defendant either broke and entered a dwelling or entered a dwelling without permission, (2) that defendant either intended when entering to commit a felony, larceny, or assault in the dwelling or at any time when entering, present in, or exiting the dwelling committed a felony, larceny, or assault; and (3) while the defendant was entering, present in, or exiting the dwelling either the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). In addition, "[i]t is well established doctrine that '[w]here an entering is a necessary element of the offense, it is sufficient if any part of defendant's body is introduced within the house.'" *People v Gillman*, 66 Mich App 419, 429-430; 239 NW2d 396 (1976) (citation omitted). For example, sticking an arm through a window constitutes an entry. *Id*. at 430.

Defendant only disputes the sufficiency of the evidence regarding the "entry" element of the offense. The evidence, when viewed in the light most favorable to the prosecution, was sufficient for a rational jury to find that defendant "entered" the dwelling. The evidence presented at trial showed that, on the evening July 22, 2010, defendant and Matthew Marshall planned to commit a robbery at 1508 Arrow Lane. The men cased the house and decided to enter the house through an open window. Marshall testified that defendant then used a screw driver to "punch out the [window] screen." Marshall then boosted defendant up toward the window. Subsequently, a police officer appeared from around the corner of the house prompting Marshall to release defendant. Upon turning the corner, Flint Police Officer Michael Ross saw that defendant was "half way in the window." Ross testified that defendant's head and shoulders were through the window and inside the house. This evidence was sufficient to establish that defendant entered the dwelling, i.e., that an entry occurred. In addition, defendant's argument that Ross's testimony was not credible, because it was contrary to his preliminary examination testimony, does not demonstrate that there was insufficient evidence because questions regarding credibility of the witnesses are left to the finder of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) amended 441 Mich 1201 (1992).

We also reject defendant's argument that the trial court erred when it scored offense variable (OV) 19 at 10 points because there was no evidence that he interfered with or attempted to interfere with the administration of justice.

The Michigan Supreme Court has recently clarified the standards of review applicable to a sentencing guidelines scoring issue. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, __ Mich __ ; __ NW2d __ (Docket Nos. 144327 & 144979, decided July 29. 2013), slip op, p 6. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. at 7.

The trial court did not clearly erred when it scored 10 points under OV 19 because the preponderance of the evidence supports the score. OV 19 is scored 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Fleeing from police can support a scoring of 10 points for OV 19. *People v Cook*, 254 Mich App 635, 638-640; 658 NW2d 184 (2003) overruled on other grounds *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). In this case, the preponderance of the evidence supports a finding that defendant fled from the police, for Ross testified that immediately after he yelled toward the men, "stop, police, get on the ground," defendant fell from the window and ran away. Marshall also testified that defendant ran away from the scene as soon as the police arrived. Sergeant John Joseph also testified that he heard Ross yell "stop" and subsequently saw defendant appear from behind at 1508 Arrow Lane and continued to run away. Joseph then chased and tackled defendant. Consequently, there was no clear error in the scoring of OV 19 because there was evidence that defendant fled from the police, which in turn supports a finding that defendant interfered with the administration of justice.

Defendant raises several additional issues regarding his sentence. A challenge to a sentence that is within the guidelines sentence range is preserved when it is raised at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals. *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013), citing MCL 469.34(10). Defendant failed to challenge his sentence at sentencing, in a motion for resentencing, or in a motion to remand filed with this Court. Thus, this issue was not properly preserved. This Court may review an unpreserved sentencing issue for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

First, defendant contends that "the sentence imposed" was excessive under both "federal constitutional and state law principles." Defendant cites US Const, Am VIII and Const 1963, art 1, § 16, and therefore, we assume that defendant argues that his sentence was cruel and/or unusual punishment. Both the United States Constitution, US Const, Am VIII, and the Michigan Constitution, Const 1963, art 1, § 16, provide that cruel and/or unusual punishment shall not be inflicted. Proportionately requires that a sentence be proportional to the "seriousness of the defendant's conduct and to the defendant in light of his criminal record[.]" *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). A sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel and/or unusual punishment under either the federal or the Michigan constitution. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Here, defendant's sentence is within the sentencing guidelines range of 78 to 260 months and is presumptively proportionate. *Powell*, 278 Mich App at 323. In addition, defendant did not assert any unusual circumstances to render the presumptively proportionate sentence disproportionate, and thus, he has not shown plain error.

Second, defendant argues that the trial court erred by failing to consider mitigating circumstances, such as his strong family support and history of alcohol and drug use. Defendant's contention is erroneous because there is no requirement that the trial court consider mitigating evidence when imposing a sentence. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). Accordingly, defendant has failed to show plain error.

Third, defendant argues that the trial court erred because it did not state reasons on the record for why both the minimum and maximum sentences were proportionate to the offense and the offender. "A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). However, the record indicates that the sentencing guidelines were before the trial court and that the trial court relied on the information within the Presentence Investigation Report (PSIR), including the sentencing guidelines. Accordingly, defendant's argument is meritless because it was "clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id*. at 313.

Fourth, defendant claims that the trial court erred when it failed to assess his rehabilitative potential and, as a result, sentenced him based on incomplete information. Although MCR 6.425(A)(1)(e) requires that a PSIR include the defendant's medical history, any substance abuse history and, if indicated, a current psychological or psychiatric report, it does not require a trial court to order an assessment of the defendant's rehabilitative potential in light of these factors. In addition, we note that defendant fails to identify any authority for his position. Consequently, the information contained in defendant's PSIR was accurate and complete, and he is not entitled to resentencing. Again, defendant has not demonstrated plain error.[2]

Finally, defendant contends that he was denied a fair trial because the prosecutor engaged in misconduct. Defendant failed to object to any alleged prosecutorial misconduct, so this issue is reviewed for plain error. See *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274

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[2] We note that in defendant's statement of the questions presented he requests that this Court review these unpreserved sentencing issues in the context of ineffective assistance of counsel. As discussed above, the issues raised by defendant have no merit. Accordingly, his defense counsel was not ineffective for failing to make meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Mich App 58, 64; 732 NW2d 546 (2007). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks and citation omitted). However, a prosecutor's latitude is not limitless. *Id.* at 282-283 In fact, "prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Id*. Additionally, "[a]ppeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But this Court will not reverse a defendant's conviction where the prosecutor makes only an isolated comment, and where the appeal to the jury sympathy is not blatant or inflammatory. *Id*. at 591. In addition, even when the prosecutor's statements would tend to elicit sympathy for the victim, reversal is not warranted if the "comments were relatively brief and did not likely deflect the jury's attention from the evidence presented[.]" *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

During closing arguments, the prosecutor stated, "One of the first questions I asked everybody was does everybody live in Genesee County. And I asked that for a reason . . . [b]ecause I wanted stake holders here, I wanted people who actually live in our community. It's time for us to take back our community." The prosecutor's comment appears to be urging the jurors to convict defendant as part of their "civic duty" as members of the public. Although this comment was improper, it was not so blatant or inflammatory that defendant was prejudiced. The prosecutor made this comment only once. Due to the brevity of the comment and the prosecutor's emphasis of the evidence supporting defendant's guilt, it is not likely that the comment diverted the jury's attention from the evidence. Moreover, the trial court instructed the jury that it could not let sympathy or prejudice influence its verdict and that the attorney's statements were not evidence. Because it is presumed that jurors follow their instructions, we conclude that these instructions cured any possible prejudicial effect. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray